WONG POOH YIN v. PUBLIC PROSECUTOR

[Privy Council (Lord MacDermott, Lord Cohen and Mr. L. M. de Silva) June 29, 30, July 27, 1954]

[Privy Council Appeal No. 9 of 1954]

Emergency Regulations 1951, Regulation 4(1) — Carrying firearm without lawful authority — Defence of lawful excuse.

In this case the appellant had been convicted under regulation 4(1)(a) of the Emergency Regulations, 1951, of carrying a firearm without lawful authority. At the trial, the appellant said he had a lawful excuse for carrying the firearm because he wanted and was waiting to surrender with it to the Police. The learned Judge held that this defence could only go towards mitigating the sentence and in effect withdrew the issue of "lawful excuse" from the assessors. On appeal, the Court of Appeal[5] held that the judge had "rightly rejected the submission of Counsel for the accused at the trial that a lawful excuse had been established which entitled the accused to acquittal". The appellant appealed to the Privy Council.

Held: (1) in proving a "lawful excuse" it is the excuse or exculpatory reason put forward by the accused, rather than the carrying, possession or control of the firearm, ammunition or explosive, that must be shown to be lawful. (2) the testimony of the appellant in this case, if accepted, went far enough to justify a finding that he was carrying the revolver on the occasion charged in the course of complying with the Government's request and because he wanted and was waiting to surrender with it to the Police when they arrived and had actually tendered it to the persons to whom he had made his offer of surrender; (3) the evidence of the appellant, if accepted, would have warranted a verdict of "lawful excuse" and the issue of lawful excuse ought to have been left to the assessors; (4) as this was not done the conviction and sentence ought to be set aside.

Cases referred to :—

(1) *Sambasivam v. Public Prosecutor* (1950) A.C. 458 at 469; (1950) M.L.J. 145 at 147.
(2) *Dickins v. Gill* (1896) 2 Q.B. 310.
(3) *Winkle v. Wiltshire* (1951) 1 K.B. 684.
(4) *Ibrahim v. Rex* (1914) A.C. 599 at 615.
(5) *Wong Pooh Yin v. Public Prosecutor* (1954) M.L.J. 29.

PRIVY COUNCIL APPEAL from the decision of the Court of Appeal of the Federation of Malaya reported at p. 29 *ante*.

Dingle Foot, Q.C. (*Dr. Colvin de Silva* and *T. O. Kellock* with him) for the appellant.

Melford Stevenson, Q.C. (*D. A. Grant* with him) for the respondent.

Lord MacDermott : — This appeal is from a judgment dated the 5th October 1953, of the Court of Appeal of the Federation of Malaya (Mathew C.J. Wilson and Buhagiar, JJ.) whereby for reasons delivered on the 12th November, 1953, the Court dismissed the appeal of the appellant from a decision of the High Court at Kota Bahru, Kelantan, on the 21st July, 1953, by which the appellant was convicted under regulation 4(1)(a) of the Emergency Regulations, 1951, of carrying a fire-arm without lawful authority and sentenced to death.

The relevant part of the regulation in question reads as follows :—

"4. — (1) Any person who without lawful excuse, the onus of proving which shall be on such person, carries or has in his possession or under his control —

(a) any fire-arm, without lawful authority therefor: or

(b) any ammunition or explosive without lawful authority therefor,

shall be guilty of an offence and shall on conviction be punished with death."

The trial took place before Abdul Hamid J. sitting with assessors, the charge being in these terms — "That you, on or about the 25th day of November, 1952, in the Temiar Ladang Area known as Gua Chah in the District of Gua Musang, Ulu Kelantan, did carry a firearm, to wit, a white handled revolver .38 without lawful authority therefor and thereby committed an offence punishable under regulation 4(1)(a) of the Emergency Regulations, 1951".

The evidence adduced by the prosecution, in proof of the offence charged, was clear. It showed beyond any question that, on the date and at the place named, the appellant was carrying the revolver described, and that he had no lawful authority to do so. The appellant did not seek to challenge these facts. His defence was simply that on the occasion referred to in the charge he had a lawful excuse for carrying the weapon.

The appellant was the only witness called in support of this plea, and reference must now be made to the parts of his testimony which bear, or were said to bear, upon it. He "went underground", he said in November, 1949, and after being in different places eventually came to Kelantan. He belonged to a party of 60 or 70 terrorists, but left them with a companion some ten days before he got in touch with the Temiars by whom he was subsequently arrested. His story, after leaving this party, may best be told by the following excerpts from the note of his evidence as taken at the trial :—

"I left them" he swore, "because whilst in the jungle we have read the Government pamphlet calling on us to come out to surrender and that we would be properly treated. The two of us left the party with the intention to surrender to the authorities. We carried with us our ammunition. I brought out Ex. P2 (the revolver).

After getting away from my comrades I first contacted 5 or 6 Temiars who are not in Court.

I speak little Temiar. I told those few Temiars that I and my friend wanted to surrender to the authorities and requested them to assist and that we wanted to see the Penghulu. They made known to us that they would arrange our surrender to the Police. They went away after the conversation."

Then, after a reference to the purchase of food from the Temiars, he continued:—

"On 24th November, between 8 and 9 Temiars came among whom was P.W. 2 (the assistant Penghulu). They told us that the Government was willing to let us surrender but we had to wait for some time to enable them to make arrangements.

We told them that as we desired to surrender they could take away our ammunition and firearms. We were told to keep them till it was arranged for the Police to take them away.

It was indicated to us that we would have to move on the next day to a place nearer to the Police Station.

On 25th November about 8 Temiars came, P.W. 2 was among them. They took us to the new place. Arriving at the new place they brought us a dog which we slaughtered and ate. On the same day at about 3 p.m. about 60 Temiars came under the leadership of P.W. 1 (the Penghulu). I greeted P.W. 1 warmly. I shook his hand and saluted "Selamat" P.W. 1 said that arrangements for our surrender had been completed and that the Government regulations were that our hands must be tied up. Our hands were tied to the back.

When I was on the point of having my hands tied up I surrendered my revolver and ammunition to one of the Temiars in the presence of P.W. 1.

The attitude of the 60 Temiars towards me was friendly when they came. When they led me away I thought they were taking me for the purpose of surrender.

I did not surrender to the Police because from the Government pamphlets that I have read it would be better to contact the public to arrange for me to surrender. Further as I had firearm there would be misunderstanding if I were to go to the Police direct."

The learned trial judge, in the course of his summing-up to the assessors said "You have heard the submission of learned counsel for the defence that it could not be an offence if the accused had the genuine intention to surrender the revolver and to offer it to the first group of Temiars. To this submission I am not inclined to agree because intention to surrender is no defence to a charge of possession or carrying of a firearm. If this can be a defence any accused person found with a firearm can always absolve himself from the charge by saying that at the time he was found with it he had the intention to surrender it to the authorities. That defence can only go towards mitigating the sentence." The assessors, without retiring, then found the appellant guilty and the judge, agreeing with their opinions, convicted the accused and sentenced him to death. On appeal the appellant contended that there has been a misdirection respecting the defence of "lawful excuse", but the Court of Appeal held that the judge had "rightly rejected the submission of counsel for the accused at the trial that a "lawful excuse" had been established which entitled the accused to acquittal" and dismissed the appeal.

At the hearing before the Board counsel for the appellant submitted that the trial judge had withheld the plea of "lawful excuse" from the consideration of the assessors. This submission was accepted as well founded by Mr. Melford Stevenson, on behalf of the Crown, and it also seems to accord with the view taken by the Court of Appeal. When the summing-up is read as a whole their Lordships are satisfied that the appellant is right on this point, and that the issue of "lawful excuse" must be regarded as having been withdrawn from the assessors by the learned trial judge.

This leaves as the main question for determination in this appeal whether this ruling was sound in law or, to put the matter another way, whether the evidence of the appellant, if accepted by the assessors, was sufficient to sustain a finding of "lawful excuse" within the meaning of the words as used in the regulation.

Their Lordships doubt if it is possible to define the expression "lawful excuse" in a comprehensive and satisfactory manner and they do not propose to make the attempt. They agree with the Court of Appeal that it would be undesirable to do so and that each case requires to be examined on its individual facts. There are, however, two general conclusions on the construction and effect of the regulation which are relevant to such an examination and which may be appropriately stated at this point. The first of these is that the defence of "lawful excuse" may be sufficiently proved although no "lawful authority" exists for doing what is charged against the accused. The terms of regulation 4(1) clearly contemplate this and, accordingly, make "lawful excuse" an expression of wider import than "lawful authority", as defined in regulation 4(2). It follows from this that in proving a "lawful excuse", which falls short of "lawful authority", it is the excuse or exculpatory reason put forward by the accused, rather than the carrying, possession or control of the firearm, ammunition or explosive, that must be shown to be lawful. And secondly, it is to be noted that regulation 4(1) does not call for any special intent on the part of the accused. In *Sambasivam v. Public Prosecutor, Federation of Malaya*[1], the Board accepted the view that knowledge of what is carried, possessed or controlled is an ingredient of this offence: but the prosecution is not obliged to explore the mind of the accused beyond this, or to show that he had any particular purpose or intention.

It is evident that this last consideration weighed with the Court of Appeal, for the learned Chief Justice, in delivering the judgment of the court, said after paraphrasing what he considered to be the substance of the appellant's defence — "This is tantamount to saying that a man can change the nature of his act, from an unlawful to a lawful one, by a mere change in his intention. That may be true of offences of which intention is an ingredient, but it is not true of

offences to which the doctrine of 'absolute prohibition' applies".

In so far as this passage decides that a *mere* change of intention on the part of a person accused under regulation 4(1) cannot, in itself, constitute a "lawful excuse", their Lordships are in agreement with it. They are of opinion that the word "excuse" connotes something more than a change of mind on the part of the person accused, and they consider that the context strengthens this view; the regulation having been so drawn that no special intent is necessary to constitute the offence thereby created, it is, to say the least, unlikely that the expression "lawful excuse" was meant to make proof of some particular intent, without more, an effectual defence.

This, however, does not suffice to dispose of the present appeal, because the evidence of the appellant was not confined to the state of his mind or to a "mere change in his intention". As appears from the excerpts quoted above it went well beyond this. It sought to show not only a change of mind and purpose, but the reason for that change in the invitation contained in the Government pamphlet; and it described in addition to the overt acts of the appellant in furtherance of his desire to surrender, the events of the 24th November, 1952 (the day before the occasion to which the charge relates) when, if the appellant is to be believed, he and his companion offered to surrender their weapons to a party of Temiars, including the assistant Penghulu, but were told "to keep them till it was arranged for the Police to take them away".

The question for decision is, therefore, wider than that posed by the Court of Appeal. It is whether all the circumstances of the situation described by the appellant, when taken in conjunction were enough to sustain a finding of "lawful excuse" in answer to the charge as framed. In approaching this question it will be convenient to refer specifically to several of the points which were taken against the appellant's defence in the Court of Appeal or before the Board.

The first of these is Mr. Stevenson's submission that if (as their Lordships would hold) a *mere* change of intention on the part of a person accused under regulation 4(1) does not amount to a "lawful excuse" the acts of the accused in implementing that change are no more than evidence of it and cannot, in themselves or when coupled with the change of intention, constitute a "lawful excuse". This submission does not cover the present case, as the facts here offered as excuse are not limited to the appellant's resolve to surrender and his conduct in consequence of that resolve, and their Lordships do not, therefore, propose to express any concluded opinion upon it. While they apprehend that every overt act by an accused person may not suffice to make the defence of "lawful excuse" available, they think it undesirable to decide this particular matter in advance of an instance which makes such a decision necessary. The latitude of the expression under discussion, the infinite variety of circumstance in relation to which it may be invoked, the tendency in this field to confusion between considerations of relevance and weight and the difficulty which may be experienced in isolating the conduct of an accused person from the impact of external events are but some of the reasons for leaving this question until it can be settled in the light of a situation that demands an answer.

The next point concerns the evidence relating to the Government pamphlets and their message. It would appear that the Court of Appeal regarded that part of the appellant's testimony as incapable of furthering the defence of "lawful excuse" and therefore irrelevant. Thus, in the judgment delivered by the Chief Justice, he says "We think it right at once to say that the policy which is adopted by the Government to induce terrorists to surrender is no concern of ours, and for the Courts to attempt to apply a policy that has not been made the subject of written law, can only lead to confusion. Whether an individual is prosecuted or not is a matter entirely for the authorities responsible for launching prosecutions, and it cannot be submitted successfully as a defence that Government in general terms has indicated that certain offences would be overlooked if offenders took a certain course". And later he adds this "If a terrorist after some time in the jungle decides to surrender with his arms, he has an excuse, and if he is acting on a 'surrender leaflet' addressed to him by the security forces, he may have a political or an administrative excuse but, in our opinion, that does not amount to a lawful excuse within the meaning of the regulation."

In the view of the Board these passages offer no no sound reason for leaving this particular part of the appellant's case out of account. It did not involve the court in applying a policy which had not the force of law or in holding that the authorities responsible for prosecutions were bound by promises of leniency made by some other branch of Government. There was no suggestion that the pamphlets altered the law or provided "lawful authority" for the carrying of arms. What was suggested was that the evidence about them was relevant and entitled to consideration because it helped to show a "lawful excuse". It is, of course, clear that every act of compliance with the direction of a Government Department may not supply a "lawful

excuse" for the doing of what would otherwise be an offence. For example, the directions given may themselves be unlawful or some other element may be present which will taint the act of compliance and make it unlawful. But, looking only to the evidence about the pamphlets as adduced in this case, their Lordships can find no reason for holding it irrelevant on this issue of "lawful excuse". On the material available it would be going far indeed to say that there was anything unlawful about the pamphlets in question or that conduct induced by them was without excuse. In a state of emergency an appeal to armed terrorists to surrender may well be a justifiable and proper step on the part of those responsible for the restoration of order, and their Lordships think that the fair assumption in the present case is that these pamphlets were appeals of that character. If so, it would be giving the expression "lawful excuse" a narrow and unnatural meaning to hold that it was incapable of applying to acts done by those appealed to in the course of making a genuine response. As already indicated, this view relates to the particular aspect of the evidence which had just been considered. It remains to be seen whether the evidence as a whole sufficed to sustain the defence.

The last submission on behalf of the Crown which calls for notice was to the effect that as the appellant's possession of the revolver had been unlawful from the beginning no supervening event could give him a "lawful excuse" for carrying it. This was the substance of the Crown case and, though not so expressed, a similar reasoning seems to underly the judgment of the Court of Appeal.

In support of this argument reference was made to several decisions of which it is only necessary to mention the two that are most in point and were cited in the opinion delivered by the Chief Justice. The first of these was *Dickins v. Gill*[2]. It relates to a prosecution for an offence under section 7(c) of the Post Office (Protection) Act, 1884, which enacted that a person shall not ". . . make, or unless he shows a lawful excuse, have in his possession any die . . . for making any fictitious stamp". The defendant, who was the proprietor of a newspaper circulating among stamp-collectors, had caused a die to be made for him abroad, from which representations of a certain Colonial postage stamp could be produced. He had ordered this die and subsequently kept it in his possession solely for the purpose of illustrating one of his publications. The charge preferred against him was not one of making the die, but of having it in his possession. The magistrate who heard the case found that the defendant's conduct was *bona fide* and that he had not the die in his possession for any improper purpose. He held that this constituted a "lawful excuse" and, accordingly dismissed the information. On appeal, by way of Case Stated, a Divisional Court (Grantham and Collins JJ.) held that the facts, including the finding that the defendant intended to use the die only for innocent purposes, did not show a "lawful excuse". Their Lordships cannot regard this decision as an authority for the proposition now under discussion. Not only did the defence pleaded sound in intention, but it is to be observed that the Court was at pains to point out that the possession charged was not innocent. Thus (at page 315) Grantham J. says "Knowing that the die could not be made in this country, and with the idea of evading the very penalties that he would be liable to under this Act if he had made it here, he had it made abroad. I think that the respondent committed an offence under that part of the section, and he was, in my judgment, acting illegally in having the die made. However that may be, it seems to me that it would be very difficult to show innocence after the die so obtained is once in his possession". And again (at page 316) — "But in a case like the present, when a man has a die made abroad because he knows he cannot have it made here, how can he have a lawful excuse for its subsequent possession? Looking at the language of section 7 of the Act of 1884, which absolutely prohibits the making of a die or a fictitious stamp, and omits all suggestion of "lawful authority" for such making, I think that the words "lawful excuse" must be construed more strictly than they would be if the section had contemplated a lawful authority for the making." It is, no doubt, true to say that in that instance the court looked to the circumstances of the acquisition of the die. But the case was not concerned with the effect of some subsequent supervening situation and the decision was not directed to any submission resembling that under consideration. The second case was *Winkle v. Wiltshire*[3]. There the defendant was charged with having in his possession without lawful excuse seven fictitious national insurance stamps contrary to section 65(1) of the Post Office Act, 1908, as applied to stamps of that kind. The material part of this enactment reads: "A person shall not . . . (b) have in his possession unless he shows a lawful excuse; any fictitious stamp . . ." The defendant bought the stamps in his own public-house and for his own use from a man who had no licence or other authority which would have enabled him to sell them lawfully. The defendant acted in good faith; he did not know the stamps were fictitious, he honestly believed they were genuine and was unaware that the man from whom he purchased

had no authority to deal in insurance stamps. The magistrate found that the defendant had shown a "lawful excuse" but a Divisional Court (Lord Goddard C.J. Humphreys and Devlin JJ) took a different view and remitted the matter with a direction to convict. In the opinion of the Board this decision does not advance the case for the Crown in this appeal. Apart from being distinguishable on its facts, the judgment of Lord Goddard (in which the other members of the court concurred) does not touch upon the effect of a new situation arising after a period of unlawful possession. There was no reason why it should. The case was one in which the excuse offered was plainly based upon the circumstances of an acquisition which the court held to be an unlawful transaction. In the result, the excuse was adjudged unlawful because the acquisition was unlawful. But this is very far from saying that an excuse can never be lawful if it follows upon an unlawful acquisition. And it is also very far from saying that the like result should attend the facts of the present appeal: for the appellant here made no attempt to rest his defence on the nature of his acquisition or on the character of his possession previous to the occasion in respect of which he was charged. On the contrary, his whole case was that he had a lawful excuse, despite his previous guilt, because the facts and circumstances of that occasion gave him an excuse which was lawful and which he had not had before.

Their Lordships cannot, therefore, regard this submission as supported by authority. Nor are they aware of any general principle of law which would be capable of sustaining it. Indeed, it appears to them that the submission runs against the implications of the regulations. As a general proposition it appears to confuse "lawful excuse" and "lawful authority". But as already observed, these expressions raise distinct issues and the question here is not necessarily determined by the absence of "lawful authority". It is still whether, without having "lawful authority", the appellant had yet a "lawful excuse".

While the evidence as to the contents of the Government pamphlets was meagre their Lordships are of opinion that the testimony of the appellant, if accepted, went far enough to justify a finding that he was carrying the revolver on the occasion charged in the course of complying with the Government's request and because he wanted and was waiting to surrender with it to the police when they arrived and had actually tendered it to the Temiars to whom he had made his offer of surrender. In the light of the views already expressed in dealing with the points made against the appellant, their Lordships, are unable to resist the conclusion that such a finding would have warranted a verdict of "lawful excuse" and they are, accordingly of opinion that that issue ought to have been left to the assessors.

It by no means follows that had this course been taken the appellant would have been acquitted. But he might have been, and having regard to the conclusions reached and the practice of the Board as stated by Lord Summer in *Ibrahim's case*[4] at page 615, the verdict clearly ought not to stand.

For these reasons their Lordships have humbly advised Her Majesty that the appeal should be allowed and the conviction and sentence set aside.

Appeal allowed.

Solicitors: *Hy. S. L. Polak Co.; Charles Russell & Co.*

KARTAR SINGH v. PAPPA

[O. C. J. (Thomson J.) March 23, 1954]

[Ipoh — Civil Suit No. 357 of 1953]

Practice and Procedure — Civil Procedure Code (Cap. 7), s. 29 — Suit to include whole claim — Obligation and collateral security for performance to constitute one cause of action — Action for money had and received still open.

The parties in this case had executed an agreement by which the defendant covenanted to repay a loan with interest and assigned by way of security a dwelling house with plank walls and cement floor. The agreement was in the form of a Bill of Sale. The plaintiff then commenced proceedings by way of Originating Summons asking for foreclosure and sale of the house. At the hearing the Summons was struck out on the ground that the house was not a personal chattel within the meaning of the Bill of Sale Enactment. The plaintiff subsequently instituted proceedings by way of Suit and rested his claim on an implied agreement or alternatively for money had and received. In her defence the defendant pleaded that this claim was barred by s. 29 of the Civil Procedure Code; and the parties agreed to have this preliminary point decided.

Held: (1) the effect of s. 29 of the Civil Procedure Code, once the security has been sued upon, is to bar the plaintiff from suing on the obligation created by the agreement, and that bar cannot depend in any way upon the nature of the evidence by which it is sought to prove the obligation; (2) it is open however to the plaintiff to proceed on an action for money had and received, for an action would lie quite apart from any contract, once certain facts which do not include agreement between the parties are established.

Cases referred to:—

(1) *Mohamed Abdullah v. Teoh Teng Swee* (1953) M.L.J. 141.

(2) *Fibrosa Solka Akeyjna v. Fairbairn Lawson Combe Barbour Ltd.* (1943) A.C. 32.